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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Tracee Monique Collins,

10 Plaintiff,

11 v.

12 Macy's Incorporated,

13 Defendant.  
14

No. CV-19-02572-PHX-GMS

**ORDER**

15  
16 Pending before the Court is Defendant Macy's Credit and Customer Services, Inc.'s  
17 ("Macy's" or "Defendant's") Motion to Dismiss and Compel Arbitration. The Motion is  
18 granted. Also pending before the Court are Plaintiff Tracee Monique Collins'  
19 ("Plaintiff's") Motion to Submit Supplemental Evidence and Motion to Consider  
20 Plaintiff's Rebuttal. The Motion to Supplement is granted and the Motion to Consider  
21 Rebuttal is denied.

22 **BACKGROUND**

23 Plaintiff was employed as a Macy's Customer Service West Frontline Loyalty  
24 Phones Agent from October 2017 to August 2018. In August 2018, Plaintiff's employment  
25 was terminated for allegedly violating Macy's attendance policy. On April 19, 2019,  
26 Plaintiff filed the underlying complaint alleging that Macy's' attendance system did not  
27 accurately and timely update her attendance.<sup>1</sup> (Doc. 1.) Macy's responded with this Motion

28 <sup>1</sup> Plaintiff alleges claims for negligence, tortious interference, and infliction of emotional distress.

1 to Dismiss and Compel Arbitration on July 11, 2019. (Doc. 12.) Macy's argues that  
2 Plaintiff agreed to arbitrate all employment-related disputes she might have with Macy's  
3 through Macy's' Solutions InSTORE Program because she did not opt out of step four of  
4 the Program within 30 days of her hire date.

5 Macy's employees are covered by Macy's employment dispute resolution program,  
6 Solutions InSTORE, but are given a chance to opt out of step four (arbitration) by  
7 completing an election form and mailing it to the appropriate office within 30 days of their  
8 hire date. Employees are informed—through a variety of means—that they agree to  
9 arbitrate disputes if they do not complete the election form. Macy's alleges that it informed  
10 Plaintiff of the Solutions InSTORE program and her ability to opt out in several ways: (1)  
11 the Solutions InSTORE New Hire Acknowledgement form (New Hire Acknowledgement  
12 Form); (2) the Solutions InSTORE New Hire Brochure (New Hire Brochure); (3) the  
13 Solutions InSTORE Step 4-Arbitration opt-out Election Form (Election Form); and (4) the  
14 Solutions InSTORE Plan Document (Plan Document).

15 Macy's alleges that on October 19, 2017, at the outset of her employment, Plaintiff  
16 viewed and electronically signed the New Hire Acknowledgement form, which stated in  
17 part: "I understand that if I do not wish to be covered by . . . Arbitration, the only way to  
18 notify the Company about my choice is by postmarking my election form within 30 days  
19 of hire and mailing it to the Office of Solutions InSTORE." (Doc. 12 at 7.) Macy's also  
20 alleges that Plaintiff was given a copy of the New Hire Brochure at the time she was  
21 completing her new hire paperwork. This includes the Election Form and the Plan  
22 Document and reiterates that employees must fill out the Election Form to opt-out of  
23 arbitration. The Election Form itself then again states that employees will be bound to  
24 arbitration if they do not act within 30 days of their hiring date.

25 Plaintiff states that she never received the Plan Document and that she did not  
26 receive the New Hire Brochure until after she "completed the electronically signed forms  
27 as instructed by the HR rep." (Doc. 15-3 at 1.) Finally, Plaintiff makes conflicting  
28 statements about whether she signed the New Hire Acknowledgement Form. In her

1 Objection to Motion to Dismiss and Compel Arbitration, Plaintiff “asserts that she clicked  
2 the button with the computer mouse with the intention and good faith acknowledging only  
3 that she received the information [contained in the New Hire Acknowledgement],” and that  
4 because Macy’s “misrepresented the material elements of the alleged contract” and  
5 “Plaintiff did not wish to ‘exclude’ herself from ‘coverage’ of this ‘benefit,’” Macy’s  
6 obtained “an alleged electronic signature” without Plaintiff’s genuine consent. (Doc. 15 at  
7 2.) She further acknowledges that she “completed the required forms as instructed.” (Doc  
8 15-1 at 2.) Macy’s claims (and Plaintiff does not dispute) that these forms included the  
9 New Hire Acknowledgement. However, at other points in her Objection, Plaintiff argues  
10 that her electronic signature was altered, and that her documents were “manipulated, edited  
11 by Macy’s” such that they are not legally enforceable. (Doc. 15-3 at 1, 2.)

## 12 **DISCUSSION**

### 13 **I. Legal Standard**

14 In a motion to dismiss for improper venue pursuant to Federal Rule of Civil  
15 Procedure 12(b)(3), courts must draw all reasonable inferences in favor of the non-moving  
16 party and resolve all factual conflicts in favor of the non-moving party. *Murphy v.*  
17 *Schneider Nat’l, Inc.*, 362 F.3d 1133, 1138 (9th Cir. 2004).

### 18 **II. Analysis**

19 On a motion to compel arbitration pursuant to the Federal Arbitration Act (FAA), a  
20 district court decides only (1) whether the parties formed a valid agreement to arbitrate,  
21 and, if so, (2) whether the agreement to arbitrate encompasses the underlying dispute.  
22 *Equal Employment Opportunity Comm’n v. Cheesecake Factory, Inc.*, No. CV08–1207–  
23 PHX–NVW, 2009 WL 1259359, at \*2 (D. Ariz. May 6, 2009). If the court decides both  
24 issues affirmatively, the court must enforce the arbitration agreement in accordance with  
25 its terms. *Id.* The FAA requires courts to construe arbitration agreements under general  
26 state law contract principles. *Id.*

#### 27 **A. Validity of the Agreement**

28 Plaintiff’s argument against the validity of the arbitration agreement is two-fold.

1 First, Plaintiff argues that her signature on the New Hire Acknowledgement was altered,  
2 and thus that she did not enter into a legally binding agreement to arbitrate. Plaintiff then  
3 argues that she is not contractually obligated to arbitrate because Macy's misrepresented  
4 material information in the agreement and because the agreement lacks consideration.  
5 (Doc. 15 at 2.)

### 6 **1. Alteration of Signature**

7 While the Court must resolve all factual conflicts in favor of Plaintiff, *Murphy*, 362  
8 F.3d at 1138, Plaintiff herself states that Macy's obtained Plaintiff's "alleged electronic  
9 signature" on her New Hire Acknowledgement because she "did not wish to 'exclude'  
10 herself from 'coverage' of th[e] 'benefit'" of arbitration. (Doc. 15 at 2.) Even assuming  
11 Plaintiff's signature was not valid, however, the FAA requires only a writing, not a  
12 signature, to create a binding arbitration agreement. *Nghiem v. NEC Elec., Inc.*, 25 F.3d  
13 1437, 1439 (9th Cir. 1994). Like the plaintiff in *Nghiem* who acknowledged receipt of the  
14 employee handbook explaining the defendant employer's arbitration process, Plaintiff has  
15 acknowledged receiving Macy's' New Hire Brochure, which lays out the Solutions  
16 InSTORE Program in detail.<sup>2</sup> As in *Circuit City Stores, Inc. v. Najd*, Macy's  
17 "communicated in detail and in writing the effect of [Plaintiff's] acceptance on [her] right  
18 to bring claims against [her] employer. Also, [Macy's] made clear that opting out of the  
19 agreement would have no effect on the employment relationship. Finally, [Plaintiff] had  
20 thirty days to review the agreement and mull over whether to opt out of it. When, as here,  
21 inaction is indistinguishable from overt acceptance, we may conclude that the parties have  
22 come to agreement." 294 F.3d 1104, 1108 (9th Cir. 2002).

### 23 **2. Misrepresentation**

24 Plaintiff alleges that Macy's made material misrepresentations in the information  
25 provided to Plaintiff detailing the arbitration agreement. First, Plaintiff argues that Macy's

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26 <sup>2</sup> Plaintiff states in her declaration that she received the Brochure after she "completed and  
27 electronically signed the required forms as instructed by the HR rep" at her pre-  
28 employment paperwork appointment on October 19, 2017. (Doc. 15-3 at 1.) Plaintiff has  
not disputed the contents of this Brochure as provided in Macy's' Declaration of Cynthia  
Ripak, Exhibit B (Doc. 12.)

1 misled her by labeling the New Hire Acknowledgement as an “acknowledgment” rather  
2 than a contract. Plaintiff confuses the Acknowledgement for the contract itself, which  
3 Macy’s has never suggested. The New Hire Acknowledgement was intended to be an  
4 acknowledgment only, not a contract. The contract was formed through the offer and  
5 acceptance of Plaintiff receiving Macy’s’ informational materials and failing to opt out of  
6 arbitration. Next, Plaintiff argues that Macy’s misrepresented material information by  
7 using the term “benefit” in connection with the Solutions InSTORE Program. While the  
8 Court is sympathetic to Plaintiff’s view that Macy’s arbitration procedure is not beneficial  
9 for *her*, arbitration has several features that could plausibly constitute benefits. *See, e.g.,*  
10 *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (arbitration is  
11 “usually cheaper and faster than litigation; it can have simpler procedural and evidentiary  
12 rules; it normally minimizes hostility and is less disruptive of ongoing and future business  
13 dealings among the parties; it is more flexible in regard to scheduling of times and places  
14 of hearings and discovery devices”). Plaintiff also argues that she was not given notice that  
15 participating in arbitration entailed waiving her right to a jury trial and spending up to \$125.  
16 But the New Hire Brochure, which Plaintiff admits she received, states this explicitly.  
17 (Doc. 12-1 at 46, 47) (“You’ll pay a portion of the arbitration costs . . . up to a maximum  
18 of \$125. . . . when covered by Step 4 final and binding arbitration you and the Company  
19 . . . both waive the right to civil action and a jury trial.”). And while the Election Form does  
20 not include this information, it encourages employees to look at the Brochure. (Doc. 12-1  
21 at 72) (“It is important to review the entire Solutions InSTORE program brochure . . . . [It]  
22 describes the features of the program, including its benefits and tradeoffs.”).

### 23 **3. Consideration**

24 Finally, Plaintiff asserts that the arbitration agreement is not valid because it was  
25 offered without consideration. Plaintiff argues that at-will employment cannot constitute  
26 consideration, particularly where, as here, the employer has promised that the employee’s  
27 job will not be affected by the decision to opt out of arbitration. The consideration in this  
28 case is not Plaintiff’s continued employment, however, but rather the fact that Macy’s is

1 also bound to arbitrate disputes if the employee does not opt out. (Doc. 12-1 at 46, 47)  
2 (“[W]hen covered by Step 4 final and binding arbitration you *and the Company* . . . both  
3 waive the right to civil action and a jury trial.”) (emphasis added). An employer’s promise  
4 to “submit to arbitration and to forego the option of a judicial forum for a specified class  
5 of claims constitutes sufficient consideration.” *Circuit City*, 294 F.3d at 1108.

6 **B. Applicability of the Agreement to the Dispute**

7 As the parties formed a valid agreement to arbitrate, the Court must next determine  
8 whether that agreement encompasses the underlying dispute—Plaintiff’s claims for  
9 negligence, tortious interference, and infliction of emotional distress stemming from her  
10 termination. Macy’s states, and Plaintiff does not dispute, that the arbitration agreement  
11 covers “all employment-related legal disputes, controversies or claims arising out of, or  
12 relating to, employment or cessation of employment” “arising under federal, state or local  
13 decisional or statutory law.” (Doc. 12 at 14.) As Plaintiff’s claims are all related to her  
14 employment and cessation of her employment, the arbitration agreement encompasses the  
15 underlying dispute. Macy’s’ motion is granted.

16 **CONCLUSION**

17 Because the parties formed a valid agreement to arbitrate and the agreement  
18 encompasses the underlying dispute, Plaintiff’s complaint must be dismissed to compel  
19 arbitration. This order shall not prevent the parties from filing in federal court in the future  
20 to enforce an arbitration award if one is granted and necessary.

21 **IT IS THEREFORE ORDERED** that Macy’s’ Motion to Dismiss and Compel  
22 Arbitration (Doc. 12) is **GRANTED**.

23 **IT IS FURTHER ORDERED** this Order shall not prevent the parties from filing  
24 in federal court in the future to enforce an arbitration award, if one is granted.

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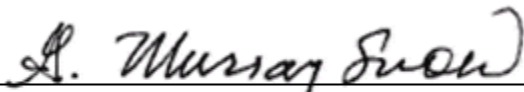
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**IT IS FURTHER ORDERED** that the Clerk of Court is directed to terminate this case.

Dated this 15th day of October, 2019.

  
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G. Murray Snow  
Chief United States District Judge